

July 22 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**DA 10-0161**

BNSF RAILWAY COMPANY,  
Appellant/Petitioner,

vs.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN RIGHTS COMMISSION,  
Appellees/Respondents.

**FILED**

JUL 22 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Re: District Court Case No.: BDV-2009-1016

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**BNSF'S BRIEF REGARDING THE DISTRICT COURT'S AMENDED  
ORDER CONCERNING MOTION FOR STAY OF EXECUTION AND  
APPROVAL OF SUPERSEDEAS BOND**

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In its amended order on BNSF's motion to stay and for approval of a supersedeas bond (the "Amended Order"), the District Court: (1) repeated its reasons for dismissing BNSF's underlying petition; (2) stated for the first time that it denied the stay because the supersedeas bond was "insufficient"; (3) gave other reasons for denying a stay; and (4) *sua sponte* vacated an order quashing a deposition subpoena Cringle served in aid of collecting the judgment.<sup>1</sup>

The Court vacated the order "because it was under the mistaken view that the matter would be quickly resolved" yet resolution had been delayed. Amended Order, p. 5, ¶¶ 13-14, p. 8, ¶ 11. But the only delay occurred because the District Court did not comply with Rule 22 in its initial order and BNSF brought that omission to this Court's attention. BNSF is perplexed why its doing so would deserve the District Court's censure. BNSF believes that Cringle's counsel will respect this Court's jurisdiction and not continue enforcement proceedings while this stay motion is pending. Should that belief prove unjustified, BNSF may ask this Court to intervene.

**I. BNSF IS ENTITLED TO A STAY OF THE MONETARY PORTION OF THE JUDGMENT BASED ON A SUPERSEDEAS BOND ALONE.**

Rule 22(1)(a), M.R.App.P., allows parties to move in the district court for any of the following: (1) a stay of judgment pending appeal; (2) approval of a

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<sup>1</sup> The District Court mistakenly said that the order quashing the deposition "grant[ed] BNSF's request for a stay of execution." Amended Order at 1.

supersedeas bond; or (3) an order suspending, modifying, restoring, or granting an injunction pending appeal. Rule 22(1)(b), M.R.App.P., provides that “[i]f the appellant desires a stay of execution, the appellant must, unless the requirement is waived by the opposing party, obtain the district court’s approval of a supersedeas bond . . .” and goes on to describe the requirements of the bond for different situations. Rule 62(c), M.R.Civ.P., separately describes the District Court’s authority to stay an injunction pending appeal, which may or may not require a bond. Read together, the rules provide that to obtain a stay of execution of a money judgment, the defendant need only obtain approval of a supersedeas bond, while other factors may come into play in determining a stay of non-monetary relief. In other words, with regard to the monetary portion of the judgment here, the only issue should be the sufficiency of the bond, not BNSF’s likelihood of success on appeal, the four federal-court factors the District Court recited in the Amended Order, or the other considerations that District Court mentioned but did not describe. *See* Amended Order at p. 5, ¶ 12, and p. 8, ¶ 10.

BNSF’s original bond in the amount of \$293,150.54 includes all amounts due, including statutory interest, as of March 30, 2011 (one year after BNSF’s Notice of Appeal). BNSF used this one-year time period because in its counsel’s recent experience this Court typically decides appeals within a year. BNSF did not include the amounts that were not payable under the judgment until after March

30, 2011, because the appeal likely will be over before those amounts are due.

BNSF believes that the original bond was sufficient to protect Cringle's interests.

The District Court's statement in the Amended Order that the bond is "insufficient to cover the judgment" is the first indication BNSF received from the District Court that it believed the bond amount was too low, assuming that is what the court meant. BNSF asked, indeed pleaded with, the District Court to say so if it thought the bond was insufficient and offered to increase the amount as the District Court saw fit. *See* BNSF's Reply Supt. Mot. Stay 4:10 – 5:7 (May 7, 2010); BNSF's Proposed Findings 3:8-12 (July 1, 2010) (attached as Ex. "A"). Yet the Amended Order does not acknowledge BNSF's requests or its offers to increase the bond. Rule 22 presumes that a District Court will inform an appellant if it views the bond as too low and identify a required adequate amount, especially when the appellant has made requests and offers like BNSF made here.

Now that the District Court has stated that the bond is insufficient, BNSF has obtained a new bond and has filed it with the District Court along with a new motion to approve. *See* BNSF's Mot. Approval Supersedeas Bond (July 21, 2010) (attached as Ex. "B"). Because the District Court still did not state what amount it believes is necessary, BNSF obtained a bond in the amount of \$555,190.71. That amount includes damages and interest through May 5, 2013 — one year past the due date of the last future damages payment and over three years after the

Judgment — and is far more than the total judgment amount of \$439,987.21.

There can be no question that this new bond is sufficient. BNSF asks this Court to either approve the initial or the new bond, thereby staying the monetary part of the judgment, or to continue to hold this motion in abeyance until the District Court rules on the motion to approve the new bond.

## **II. THE COURT SHOULD STAY THE NON-MONETARY PORTION OF THE JUDGMENT AS WELL.**

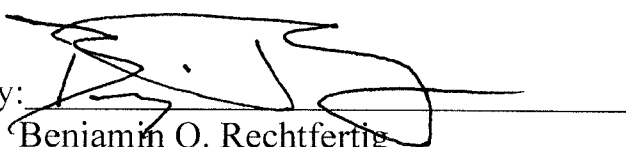
One reason the District Court gave for denying BNSF's motion to stay was that the underlying facts of this case are similar to other cases where it has ruled against BNSF on the merits. *See* Amended Order at p. 5, ¶ 12, and p. 8, ¶ 10. But this case does not now concern the underlying merits. BNSF sought review of a Human Rights Commission ("HRC") order dismissing BNSF's appeal of a hearing officer's decision and refusing to consider a request for extension of the appeal filing period. BNSF did *not* seek review in District Court of the *merits* of the hearing officer's decision, so the question whether BNSF unlawfully discriminated is not at issue now. Further, the Amended Order largely repeats the reasons the District Court gave when granting Cringle's and the Department's motions to dismiss. As explained in BNSF's opening brief, those reasons do not support dismissal. The District Court held that it lacked jurisdiction to review the HRC's procedural dismissal order because the statute prevents BNSF from seeking judicial review of the hearing officer's determination that BNSF discriminated,

which was not what BNSF was seeking. Accordingly, if the District Court recited its earlier reasoning to show that BNSF's chances on appeal are poor, that effort should fail because the reasoning is both misplaced and incorrect.

Relatedly, the District Court erred in adopting Cringle's proposal to use the four-factor test used by federal courts in deciding stay requests. *See* Amended Order, p. 9, ¶ 12. Cringle's Findings & Conclusions, p. 3, ¶ 3 (June 24, 2010) (attached as Ex. "C"). First, the District Court apparently relied on the test to deny BNSF a stay of the monetary portion of the judgment as well as the non-monetary portion. But as explained, a stay of the monetary portion of the judgment should be determined based on the bond alone. That approach is consistent with the federal law the District Court referenced because the federal test the District Court adopted only applies to non-monetary relief; like Montana, the federal system provides that a sufficient bond automatically stays the monetary portion of a judgment. Fed. R. Civ. P. 62(d). Second, the use of the test for any purpose was legal error because this Court has rejected it. *Brackman v. Board of Nursing*, 250 Mont. 368, 371, 820 P.2d 1314, 1315-1316 (1991). Because the monetary portion of the judgment should be stayed based on one of the supersedeas bonds, the non-monetary portion should also be stayed in the interests of justice, especially since that relief is for the State's benefit, and the State has not opposed BNSF's stay efforts.

DATED this 21st day of July, 2010

By:

  
Benjamin O. Rechtfertig

### CERTIFICATE OF SERVICE

I do hereby certify that I have served a true and correct copy of the foregoing upon individual(s) listed below by the following means:

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DATE: July 21, 2010

